Filed 3/30/05 P. v. Gill CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. RONALD GENE GILL, Defendant and Appellant.	C045452 (Super. Ct. No. CR002546)

Defendant Ronald Gene Gill was convicted of failing to stop at the scene of an injury accident, a felony (Veh. Code, § 20001, subd. (a)), and driving with a suspended license, a misdemeanor (Veh. Code, § 14601.5, subd. (a)). After he violated probation three times, his probation was revoked. He was sentenced to state prison for two years for the felony, with a concurrent jail term of six months for the misdemeanor, and was ordered to pay $9,432 in restitution to Angela Danielson and $7,432.28 in restitution to Sherry Cardoza.

On appeal, defendant contends (1) the trial court abused its discretion in refusing his request for a hearing to offset his restitution obligation by the amount his insurance carrier paid the victims, (2) his counsel was ineffective for failing to properly prepare and present argument in support of a restitution hearing, and (3) the court abused its discretion in failing to determine whether the victims' damages resulted from his criminal acts.

The People claim defendant's appeal should be dismissed because he did not appeal from the trial court's initial order of restitution imposed as a condition of probation.

We will remand the matter for consideration of defendant's restitution obligation in light of any payments made to the victims by defendant's insurance carrier. Otherwise, we shall affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On April 22, 2000, defendant drove his mother's Camero without permission and turned a corner too fast, sideswiping a car driven by Angela Danielson. The car belonged to her mother, Sherry Cardoza. When police arrived, defendant was not there. He did not stop at the scene of the accident because he was driving on a suspended license. Defendant's mother found out about the accident and told defendant to turn himself in to the police.

In July 2000, defendant pled no contest to failing to stop at the scene of an injury accident (Veh. Code, § 20001, subd. (a)) and driving with a suspended license (Veh. Code, § 14601.5,

subd. (a)). On September 13, 2000, he was placed on probation and, on October 4, 2000, probation was modified, requiring him to pay $9,147.28 in restitution, while leaving the final amount open for ongoing medical costs.

On October 17, 2000, the People requested an additional $128 in restitution to Danielson for an emergency room visit. At the November 1, 2000, hearing on the People's request, defense counsel asked for a reexamination of the entire restitution amount because "the victim was indemnified by the insurance company to the tune of over $7[,]000."[1] The trial court said it would set the matter for a contested hearing after defendant filed his motion and the People filed its response.

No motion was filed, and on the date set for the contested hearing, December 6, 2000, defense counsel dropped the matter from calendar.

After defendant violated probation in 2001, 2002, and 2003, the trial court, on July 25, 2003, sentenced him to state prison for two years and ordered him to pay $9,432 in restitution.

On August 14, 2003, the People made a written request for a restitution hearing because the current order did not address restitution to the owner of the car.

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[1] A supplemental probation report had been filed with the trial court in September, stating Cardoza reported that her car was "totaled" and that "the car insurance paid approximately $7,000, which was the remaining balance on her vehicle loan, and over the course of three and a half years she has paid approximately $13,000."

On October 2, 2003, defense counsel objected to all the claimed restitution because defendant was insured, the insurance carrier paid for damage to the vehicle and medical claims, defendant's crime of fleeing the scene of the accident did not cause the victims' damages, and the prior restitution order was a condition of probation. The trial court stated it was not relitigating issues determined in September 2000 because defendant should have contested the matter back then. Thereafter, on October 14, 2003, the clerk filed an abstract of judgment specifying $9,432 in restitution to Danielson.

On October 30, 2003, the People sought to have the issue of restitution recalendared, asking the trial court to order a minimum of $7,432.28 in restitution to Cardoza.

On November 5, 2003, the parties argued the restitution issue again. Defense counsel claimed that defendant's crime was not involvement in the car accident but, rather, running from the accident and driving with a suspended license.[2] The trial court disagreed, stating "but for driving on a suspended license, there would not have been an accident." The court then recalled the sentence and reimposed the sentence imposed on July 25, 2003, ordered defendant to serve six months in jail for his conviction

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[2] Defense counsel explained that defendant's previous attorney was supposed to litigate this issue in 2000 but dropped the matter from calendar because of "press of business." Neither defendant nor defense counsel "intended to waive that aspect of his argument, and it has always been [their] . . . position that restitution is not proper in this case."

for driving with a suspended license, and ordered $9,342[3] in restitution to Danielson and $7,432.28 to Cardoza. The same day, defendant filed a notice of appeal challenging the imposition of victim restitution.

DISCUSSION

I

The People claim that defendant's appeal should be dismissed because he did not timely appeal from the original restitution order of September 2000 and his claims arise out of that order. We address the appealability of the restitution ordered to Danielson and to Cardoza separately because they implicate different legal principles.

The court's restitution order to Danielson, imposed initially as a condition of probation in October 2000, required defendant to pay $9,147.28. In November 2000, defense counsel questioned the restitution amount, including an additional $128 being claimed as ongoing medical costs, arguing that the victim had been indemnified by insurance. However, defense counsel failed to file a motion on the issue, and dropped the matter from calendar in December 2000. In July 2003, when it sentenced defendant to prison, the court ordered him to pay $9,432 in restitution to Danielson. When

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[3] Both the minute order and abstract of judgment state that the amount of restitution to Danielson is $9,432, but the reporter's transcript states that the amount is $9,342. It is evident from the record that the trial court intended to order $9,432 in restitution to Danielson because this was the amount the court imposed when it initially sentenced defendant to prison in July 2003.

defense counsel attempted to challenge that amount, the court stated it was not relitigating issues determined in 2000 because counsel should have contested the matter back then.

Assuming the trial court was correct that defendant should have challenged the restitution ordered to Danielson in 2000, we still must reach the merits of defendant's claims relating to that order because he argues his trial counsel was ineffective in 2000 for failing "to properly research, prepare, and present his opposition to the restitution imposed . . . ."

A defendant claiming ineffective assistance of counsel has the burden of showing that counsel failed to act in a manner to be expected of reasonably competent counsel, i.e., that "counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674, 693].) "Reviewing courts will reverse . . . on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

This is one of those cases where the record affirmatively discloses that trial counsel had no rational tactical purpose for failing to challenge the restitution ordered to Danielson in 2000. On November 5, 2003, when arguing the restitution issue, defense counsel explained that defendant's previous attorney had dropped the restitution issue from calendar in 2000 because of "press of business." Counsel represented that no one intended to waive the argument, and that "it has always been our office's position that restitution is not proper in this case."

Given this explanation of counsel's behavior in 2000, which discloses no reasonable tactical purpose for failing to challenge the restitution ordered to Danielson, we reach defendant's issues on appeal relating to that restitution order.

We now turn to whether defendant can challenge the restitution ordered to Cardoza.

A defendant may appeal from a "final judgment of conviction" or appeal "[f]rom any order made after judgment, [which affects] the substantial rights of the party." (Pen. Code, § 1237; further section references are to this code unless otherwise specified.) Rendition of judgment occurs when sentence is pronounced. (*People v. Thomas* (1959) 52 Cal.2d 521, 529, fn. 3.)

When a defendant has been sentenced to incarceration in state prison, the trial court may, within 120 days of the date of the commitment, "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced . . . ." (§ 1170, subd. (d).)

On November 5, 2003, the court imposed such a sentence pursuant to section 1170, subdivision (d), when it recalled defendant's entire sentence, reimposed the same prison sentence and added Cardoza as an additional victim entitled to restitution in the amount of $7,432.28. Thus, defendant's issue regarding restitution to Cardoza is cognizable from this final judgment of conviction.

II

Defendant claims the trial court abused its discretion in refusing his request for a restitution hearing to consider whether he was entitled to an offset in his restitution obligations because

his insurance carrier paid the victims for damage to the car and medical injuries. His contention has merit.

"It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution *directly from* any defendant convicted of that crime." (§ 1202.4, subd. (a)(1), italics added.) Victims are entitled to restitution of the full amount of the losses determined to have resulted from the defendant's conduct, regardless of any amount reimbursed to the victims by their insurance company or similar third parties. (*People v. Birkett* (1999) 21 Cal.4th 226, 246 [a victim's insurance carrier that reimbursed the victim for damages from defendant's crime is not a direct victim entitled to restitution]; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1272 [the fact all the victim's medical bills were paid by Medicare and Medi-Cal should not shield defendant from a restitution order that requires him to pay the full amount of the loss caused by his crime].)

In contrast, when a defendant's own insurance carrier makes payments to the victim on behalf of the defendant pursuant to a contractual obligation to do so, the defendant is entitled to an offset to his restitution obligations to the extent those payments are for items of loss included in the restitution order. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 168 (hereafter *Bernal*).)

Bernal explained: "The defendant's own insurance company is different than other sources of victim reimbursement, in that (1) the defendant procured the insurance, and unlike the other third party sources, its payments to the victim are not fortuitous but

precisely what the defendant bargained for; (2) the defendant paid premiums to maintain the policy in force; (3) the defendant has a contractual right to have the payments made by his insurance company to the victim, on his behalf; and (4) the defendant's insurance company has no right of indemnity or subrogation against the defendant. In sum, the relationship between the defendant and its insurer is that payments by the insurer to the victim are 'directly from the defendant.'" (*Bernal*, *supra*, 101 Cal.App.4th at p. 168.)

While acknowledging that payments from defendant's insurance carrier are considered payments directly from defendant, the People contend no hearing is necessary because the payments have no effect on the restitution order itself, and if such payments have been made, it "is simply an accounting issue that can be handled administratively without involving the court."

To support this proposition, the People cite language in *Bernal* that a settlement agreement with, and release of, a defendant's insurance company by the victim cannot release defendant's financial debt to the state. (*Bernal*, *supra*, 101 Cal.App.4th at p. 162.) The People have taken this language out of context. It appears in the portion of the opinion holding that a written release given by the victim to a defendant's insurance carrier does not bar restitution. (*Id.* at p. 160.)

In the part of the opinion at issue here, *Bernal* "conclude[d] that settlement payments made to [the victim] by [defendant's] insurance carrier must be an offset to [defendant's] restitution obligation to the extent that those payments are for items of loss

included in the restitution order." (*Bernal*, *supra*, 101 Cal.App.4th at p. 168.) Thus, *Bernal* remanded the matter to the trial court to determine defendant's remaining restitution obligation. (*Ibid.*)

Here, defendant's counsel stated defendant was insured and the insurance company paid for damage to the vehicle and "any medical claims that were related to it." In addition, counsel said one of the victims signed a release with the insurance company.

While the release will not bar restitution (*Bernal*, *supra*, 101 Cal.App.4th at pp. 160-161), we remand the matter to the trial court in order for it to determine whether defendant's insurance carrier paid for any items of loss included in the restitution order to Danielson and Cardoza, and if so, the amount of that payment. The payment must be considered an offset to defendant's restitution obligations.

III

Defendant contends the trial court abused its discretion when it failed to determine whether the victims' damages resulted from defendant's criminal acts. The court, which at a prior hearing had stated it was not relitigating this issue, ruled that but for defendant's driving on a suspended license, there would have been no accident.

We review the court's ruling, not its reasoning (*People v. Mason* (1991) 52 Cal.3d 909, 944), and find no abuse of discretion in ordering restitution to the driver and owner of the car because defendant's act of sideswiping his mother's Camero into Cardoza's car injured Danielson and damaged the car.

Article I, section 28, subdivision (b) of the California Constitution, states: "It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary."

Section 1202.4 implements this constitutional directive for nonprobationary cases. (*People v. Moloy* (2000) 84 Cal.App.4th 257, 260.) Subdivision (a)(1) of that section provides: "It is the intent of the Legislature that a victim of crime who incurs any economic loss *as a result of the commission of a crime* shall receive restitution directly from any *defendant convicted of that crime*." (Italics added.) Subdivision (f) states: "In every case in which a victim has suffered economic loss *as a result of the defendant's conduct*, the court shall require that the defendant make restitution to the victim . . . ." (Italics added.)

The single prerequisite in subdivision (f) of section 1202.4, to unequivocal entitlement to restitution for a victim, is that the economic loss was incurred "as a result of the defendant's conduct." Subdivision (a)(1) of section 1202.4 does not limit the amount of restitution to losses caused by criminal conduct for which the defendant was convicted, and we will not infer such a limitation.

Consistent with subdivision (f) of section 1202.4, the trial court imposed restitution for economic loss incurred by Danielson

and Cardoza resulting from defendant's conduct. The probation report filed in September 2000 stated that defendant turned a corner too fast and sideswiped the car driven by Danielson. These facts were taken from the police report of the incident. When defendant was interviewed by the probation department in August 2000, "[h]e state[d] the circumstances happened as stated in the police report, and he ha[d] nothing else to add. He just made a stupid mistake."

Under the circumstances, there was no abuse of discretion in ordering restitution to Danielson and Cardoza.

DISPOSITION

The case is remanded to determine the amount, if any, paid by defendant's insurance carrier to Danielson or Cardoza for items of loss included in the restitution order and defendant's remaining restitution obligation in light of those payments. In all other respects, the judgment is affirmed.

SCOTLAND, P.J.

We concur:

SIMS, J.

CANTIL-SAKAUYE, J.